ATTORNEYS FOR APPELLANT:

KEVIN C. TYRA
Tyra Sweetin & Bleeke, P.C.
Indianapolis, Indiana

ATTORNEY FOR APPELLEES

DOUGLAS D. SMALL
Foley & Small
South Bend, Indiana

IN THE
COURT OF APPEALS OF INDIANA

CANDLEWOOD APARTMENTS, L.P.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A04-0612-CV-717
	)	
CECIL GOEN AND BETTY GOEN,	)	
	)	
Appellees-Plaintiffs.	)	

APPEAL FROM THE ST. JOSEPH CIRCUIT COURT
The Honorable Michael G. Gotsch, Judge
Cause No. 71C01-0411-CT-196

October 18, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

A jury verdict awarded Cecil Goen and Betty Goen (collectively the "Goens") $296,887.41 after finding their landlord, Candlewood Apartments, L.P., ("Candlewood"), 100% liable for injuries sustained when Cecil's fell on Candlewood's premises. Candlewood appeals the jury's verdict and the trial court's denial of Candlewood's motion for summary judgment, motion for judgment on the evidence, and motion to correct error. Candlewood raises the following issues, which we restate as:

I. Whether Candlewood's motion for summary judgment should have been granted.

II. Whether Candlewood was entitled to partial judgment on the evidence.

III. Whether there was sufficient evidence to support the jury's finding that the Goens were 0% at fault.

IV. Whether the jury's verdict was excessive and based on passion, prejudice, sympathy, or speculation.

We affirm.

FACTS AND PROCEDURAL HISTORY

Cecil is 80-years old and suffers from post-polio syndrome. He and his wife, Betty, were tenants at Candlewood.

On June 16, 2004, Cecil fell while stepping off a sidewalk on Candlewood's premise. As a result of the fall, Cecil suffered an intertrochanteric fracture[1] that required significant surgery and two years of rehabilitation. After this injury, he was no longer

[1] An intertrochanteric fracture is a fracture of the femur head, the femur neck, the trochanters, or the inter- or subtrochanteric region. It is not a fracture of the acetabulum or of the femoral shaft below the subtrochanteric region. *See Medical Dictionary Online*, "Intertrochanteric Fractures," *available at* http://www.online-medical-dictionary.org/omd.asp?q=intertrochanteric+fractures. The fracture resides at the top of the femur near the hip joint. *Id.*

able to walk with a cane and needed to use a wheelchair.

The Goens filed a complaint against Candlewood alleging its negligence in the maintenance of its property caused the Goens' injury. The Goens claimed that Candlewood was negligent for failing to properly maintain its premises, for allowing loose gravel to accumulate on the sidewalk and driveway where Cecil fell, and for failing to paint strips on a parking place in front of a wheelchair ramp on the premises preventing Cecil from using his wheelchair at the time of his fall. Candlewood filed a motion for summary judgment claiming the gravel on the driveway was not a hazard that gives rise to a duty, and if it was a hazard, it was open and obvious. The trial court denied the motion. At trial, Candlewood moved for a partial judgment on the evidence to remove from the jury's consideration Candlewood's failure to appropriately paint the parking spot in front of the wheelchair ramp. The trial court denied the motion.

The jury returned a verdict that declared Candlewood 100% at fault, the Goens 0% at fault, and a $296,887.41 award in favor of the Goens. Candlewood moved to correct four alleged errors: (1) the issue of lack of paint marking the wheelchair ramp access should have been withheld from the jury because Cecil did not need his chair; (2) Cecil was comparatively at fault because he did not walk his wheelchair to the end of the sidewalk; (3) its motion for summary judgment was proper; and (4) the jury verdict was excessive, was not supported by the evidence, and was based upon speculation, conjecture, sympathy, passion, or prejudice. The trial court denied the motion. Candlewood now appeals.

DISCUSSION AND DECISION

I. Negligence

Candlewood contends that the trial court erred in denying its motion for summary judgment because it did not have notice of any dangerous condition in the parking lot, and it exercised reasonable care in keeping the premises safe. Candlewood also maintains that the Goens failed to show that Candlewood's negligence proximately caused their injuries.

Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C); *see also Coffman v. PSI Energy*, 815 N.E.2d 522, 526 (Ind. Ct. App. 2004), *trans. denied* (2005). On appeal, we apply the same standard as the trial court and look only at the evidence designated to determine whether there is a genuine issue of material fact requiring trial, and whether the moving party is entitled to judgment as a matter of law. *Id.* "The court must accept as true those facts alleged by the nonmoving party, construe the evidence in favor of the nonmov[ing party], and resolve all doubts against the moving party." *Id.*

"To recover under a theory of negligence, a plaintiff must establish these elements: '(1) defendant's duty to conform his conduct to a standard of care arising from his relationship with the plaintiff, (2) a failure of the defendant to conform his conduct to the standard of care, and (3) an injury to the plaintiff proximately caused by the breach.'" *Horine v. Homes by Dave Thompson*, 834 N.E.2d 680, 683 (Ind. Ct. App. 2005) (quoting *Estate of Heck ex. rel. v. Stoffer*, 786 N.E.2d 265, 268 (Ind. 2003)). A defendant in a

negligence case seeking summary judgment must demonstrate the designated facts do not support a verdict in favor of the plaintiff or that an affirmative defense precludes liability. *PSI Energy*, 815 N.E.2d at 526. "We note that summary judgment is generally inappropriate in negligence cases because issues of contributory negligence, causation, and reasonable care are more appropriately left for the trier of fact." *Id.* At the same time, we recognize that determining whether the facts support a viable negligence claim is a question of law. *Id.*

This court reviews a trial court's grant or denial of a motion to correct error for an abuse of discretion. *Paragon Family Restaurant v. Bartolini*, 799 N.E.2d 1048, 1055 (Ind. 2003). Indiana Trial Rule 59(J) requires a trial court to grant a new trial on a motion to correct error if the court determines that the jury verdict is "against the weight of the evidence," and to enter judgment if it determines that the jury verdict is "clearly erroneous as contrary to or not supported by the evidence." *Id.* (citing Ind. Trial Rule 59(J)).

A. Hazardous Condition

The Goens alleged that Candlewood was negligent because it failed to repair and maintain the drive and sidewalk in a safe condition. Specifically, the Goens argue that Candlewood's failure to properly stripe and mark the handicap ramp as required by building code, failure to repair the deteriorated sidewalk, and failure to sweep the resulting debris, caused Cecil's injuries.

Candlewood moved for summary judgment contending that the pieces of gravel where Cecil Goen fell did not create a hazardous condition that would require reasonable

care under the circumstances. Candlewood argues that there is no authority to say gravel is a hazardous condition and that to find otherwise would create liability for anyone who has gravel on his or her premises.

Candlewood cites *Gilpin v. Ivy Tech State College*, 864 N.E.2d 399, 403 (Ind. Ct. App. 2007), where this court ruled that the defendant's duty to the plaintiff, a licensee, was to refrain from wanton conduct and to warn the plaintiff of all latent or concealed defects. We held that the loose gravel on the sidewalk where plaintiff fell was not a latent defect because the plaintiff was aware of it before he fell. *Id.* Thus, the defendant was not required to warn the plaintiff. *Id.* While Candlewood admits that this case is distinguishable in that, here, Goen, as a tenant, was an invitee, it argues that *Gilpin* is still persuasive because it held a landowner does not owe a duty to protect and warn a licensee about the presence of gravel.

Contrary to Candlewood's contention, the issue is not whether gravel, *per se*, constituted a hazardous condition. Rather, its is whether the condition of the sidewalk and drive taken as a whole was hazardous. In *Gilpin*, the presence of the gravel was the determining factor. Here, it was one of several factors for the jury to consider in determining whether Candlewood was negligent. The gravel where Cecil fell was in the same area as the deteriorating sidewalk. There was a question of fact whether Candlewood failed to properly maintain its premises by allowing the sidewalk deterioration and the gravel to remain. As such, the trial court did not error in denying Candlewood's motions for summary judgment, judgment on the evidence, and correction of error.

B. Reasonably Foreseeable

Candlewood next argues that even if the gravel was a hazardous condition, it was not reasonably foreseeable to Candlewood. Since a premise owner is only required to protect invitees from dangers it knows pose an unreasonable risk, Candlewood claims it did not fail its duty to the Goens.

This court has already held that the issue of notice of a danger is a question of fact for the jury. *St. Mary's Ctr. of Evansville, Inc. v. Loomis*, 783 N.E.2d 274, 279 (Ind. Ct. App. 2002) (citing *Shloot v. Guinevere Real Estate Corp.*, 697 N.E.2d 1273, 1276 (Ind. Ct. App. 1998)). The evidence to support the owner had notice of the dangerous condition does not have to be conclusive, but only established by a reasonable inference. *Id.*

Under the Restatement (Second) of Torts (1965):

> § 343. Dangerous Conditions Known to or Discoverable by Possessor
>
> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he:
>
> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
>
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
>
> (c) fails to exercise reasonable care to protect them against the danger.

Baxter, 796 N.E.2d at 243-44 (quoting Restatement (Second) of Torts §343 (1965)).[2]

> "For the purpose of analysis of breach of duty, a landowner's knowledge is evaluated by an objective standard. This is in contrast to the determination of incurred risk, wherein the invitee's mental state of venturousness (knowledge, appreciation, and voluntary acceptance of the risk) demands a subjective analysis of actual knowledge."

Baxter, 796 N.E.2d at 244 (quoting *Douglass v. Irwin*, 549 N.E.2d 368, 370 (Ind. 1990)).[3]

Here, Candlewood asserts that since Betty walked over the condition prior to Cecil and did not warn him, we can reasonably infer that Betty did not foresee the danger and, thus, we can infer Candlewood did not or would not have foreseen the danger. The Goens, however, presented evidence that Candlewood was aware of the condition; that the prior owner swept its streets, but Candlewood discontinued the practice; that Candlewood had not painted the handicapped-parking ramp as required by building code; that vehicles frequently blocked the ramp for both wheelchair and walking traffic; and that the sidewalk and curb in front of the Goens' residence was deteriorating, and pieces of concrete and gravel were present. Most significantly, Candlewood's property manager admitted that the curb and sidewalk were in a state of deterioration and that the maintenance staff did not have a schedule to clean up or repair the area. These facts were sufficient to show that Candlewood was aware or should have been aware of the

[2] Comment (a) of the Restatement (Second) of Torts §343 (1965) states that this section shall be read in conjunction with §343A, "which deals with the effect of the fact that the condition is known to the invitee, or is obvious to him." Since we address 'open and obvious' risk (incurred risk) in the next section, we wait until then to present the language in §343A.

[3] We note that sections 343 and 343A of Restatement (Second) of Torts (1965), setting forth duty of care owed by possessor of land to an invitee, survived adoption of Comparative Fault Act and remain a part of Indiana's common law. *Tate v. Cambridge Commons Apartments of Indianapolis*, 712 N.E.2d 525, 527 (Ind. Ct. App. 1999), *trans. denied*.

condition. Candlewood's motions for summary judgment, judgment on the evidence, and correction of error were inappropriate.

C. Incurred Risk

Candlewood argues that if there was a hazardous condition, it was open and obvious to the Goens, and that Candlewood was not required to protect the Goens against an obvious risk that they incurred, but consciously disregarded.

The Restatement (Second) of Torts §343A states:

> Known or Obvious Dangers
>
> (1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.
>
> (2) In determining whether the possessor should anticipate harm from a known or obvious danger, the fact that the invitee is entitled to make use of public land, or of the facilities of a public utility, is a factor of importance indicating that the harm should be anticipated.

Candlewood cites *Tate v. Cambridge Commons Apartments of Indianapolis*, 712 N.E.2d 525 (Ind. Ct. App. 1999), *trans. denied*, where the plaintiff was delivering drywall on an ice-covered sidewalk. The contractor noticed the icy conditions yet still walked over the ice. The first time the plaintiff walked over the sidewalk without injury, but the second time the plaintiff fell and broke his ankle. This court held that the danger was open and obvious and that plaintiff incurred the risk.[4] *Id.* Candlewood claims that

[4] The court also determined that even though it was reasonably foreseeable that the plaintiff would encounter the danger rather than forego his employment, the case was distinguishable from a previous case where the defendant was liable because the plaintiff would have lost his job had he not encountered the danger. *Tate v. Cambridge Commons Apartments of Indianapolis*, 712 N.E.2d 525 (Ind. Ct. App. 1999), *trans. denied*.

Cecil, just like the plaintiff in *Tate*, incurred the open and obvious risk when he choose to walk with only his cane over the curb where the pieces of gravel or concrete were easily visible against the blacktop parking lot.

Our Supreme Court has held that incurred risk as a complete defense no longer exists, but is subsumed by the Indiana Comparative Fault Act. *Baxter*, 796 N.E.2d at 245 (citing *Heck v. Robey*, 659 N.E.2d 498, 504 (Ind. 1995)). Specifically, incurred risk may no longer work to vitiate a duty, but only may be used to determine whether there has been a breach of that duty. *Id.*

Unlike *Tate*, the facts here do not clearly show that the risk was known or obvious to the Goens. The pictures introduced into evidence do not suggest the loose pieces of rock were obvious to the Goens or would be to a reasonable person. *See Ex.* 17. Moreover, it was for the jury to determine, as it did, whether the Goens subjectively incurred a known or obvious risk, and whether the act proximately caused their injuries. The trial court did not err in its denial of Candlewood's motions for summary judgment, judgment on the evidence, and motion to correct error.

II. Non-Painted Parking Ramp

Candlewood claims that the issue of its failure to paint stripes on the parking space in front of its wheelchair ramp was irrelevant to liability and permitted the jury to draw an unreasonable inference that entitled it to partial judgment on the evidence. Specifically, Candlewood contends Cecil did not use, did not need to use, and could have, if he wanted to, used his wheelchair.

The standard of review for a challenge to a ruling on a motion for judgment on the

evidence is the same as the standard governing the trial. *Baxter*, 796 N.E.2d at 243. Judgment on the evidence is only proper where at least one issue is not supported by sufficient evidence. *Id.* (citing Ind. Trial Rule 50(A)). Judgment on the evidence is proper only when there is a total lack of evidence in favor of the plaintiff, stated differently, the evidence is without conflict and is susceptible of only one inference in favor of the defendant. *St. Mary's Ctr. of Evansville, Inc. v. Loomis*, 783 N.E.2d 274, 279 (Ind. Ct. App. 2002). If there is evidence that would allow reasonable people to differ as to the result, judgment on the evidence is improper. *Baxter*, 796 N.E.2d at 243.

Candlewood presents several facts, that together it claims, warrant partial judgment on the evidence: (1) there were two signs clearly marking the area as handicapped; (2) Cecil rarely, if ever, used his wheelchair and only needed it for long distances; (3) Cecil was mobile with his cane all the time; (4) Cecil acknowledged he could have walked the wheelchair down to the end of the sidewalk without using the ramp. Candlewood also contends there was no evidence to suggest that, if the parking space in front of the wheelchair ramp was painted pursuant to the building code, someone would not have parked there.

Here, the evidence demonstrated that the Goens had specifically requested the installation of a wheelchair ramp. The ramp was built, but the parking place in front of it was not painted with stripes as required by the building code. On the date Cecil fell, the parking space was occupied by a vehicle, blocking the wheelchair ramp and prohibiting the Goens from using it. This evidence was sufficient for the jury to determine whether Candlewood's failure to paint the parking space pursuant to code was a proximate cause

of the Goen's injuries. The trial court did not abuse it discretion in denying Candlewood's motion for partial judgment on the evidence on this issue.

III. Comparative Fault

Candlewood claims that the jury's finding that it was 100% at fault is contrary to the evidence. In regard to this claim, Candlewood appeals from a negative judgment. In order for Candlewood to prevail on appeal, it must establish that the trial court's decision was contrary to law. *Hall v. Eastland Mall*, 769 N.E.2d 198, 205-06 (Ind. Ct. App. 2002). We will consider the evidence in the light most favorable to the Goens and will reverse the judgment only if the evidence leads to but one conclusion and the jury reached an opposite conclusion. *Id.*

"We note that the apportionment of fault is uniquely a question of fact to be decided by the fact-finder." *Loomis*, 783 N.E.2d at 285 (quoting *Hampton v. Moistner*, 654 N.E.2d 1191, 1195 (Ind. Ct. App. 1995)). The point where apportionment of fault becomes an issue of law solely for the trial court "is reached only when there is no dispute in the evidence and the fact-finder is able to come to only one logical conclusion." *Id.*

Our Supreme Court acknowledged that Indiana's Comparative Fault Act governs any actions to recover damages for injury or death based on fault of a property owner. *Baxter*, 796 N.E.2d at 244 (citing IC 34-51-2-1).

> Where [it] applies, it operates to diminish a claimant's recovery by the amount of the claimant's contributory fault, and bars recovery altogether in situations where the claimant's contributory fault is found to be greater than the fault of all other persons whose fault proximately contributed to the claimant's damages.

Id. at 244-45 (citing IC 34-51-2-6(a)).

Candlewood contends that the Cecil incurred an obvious risk (the gravel) that forgave Candlewood's duty, he failed to walk his wheelchair to the end of the sidewalk, and failed to request assistance, and that Betty failed to warn or assist her husband. Candlewood has failed to show that the evidence established only one conclusion - that the Goens' actions or inactions were the proximate cause of their injuries or an assumption of the risk. Instead, the Goens presented evidence that Candlewood's actions and inactions were the proximate cause of their injuries. As such, the issue of comparative fault was a factual issue for the jury to determine. *See Loomis*, 783 N.E.2d at 285.

IV. Damages

Lastly, Candlewood argues that the jury's award of $296,887.41 in damages was excessive. Specifically, Candlewood argues that the jury award was inappropriate because the award was artificially inflated by the jury's sympathy for the Goens and dislike for Candlewood.

A jury's determination of damages is entitled to great deference when challenged on appeal. *Sears Roebuck and Co. v. Manuilov*, 742 N.E.2d 453, 462 (Ind. 2001). The *Manuilov* court noted, "'if there is any evidence in the record which supports the amount of the award, even if it is variable or conflicting, the award will not be disturbed.'" *Id.* (quoting *Prange v. Martin*, 629 N.E.2d 915, 922 (Ind. Ct. App. 1994), *trans. denied*).

Candlewood has failed to show that the jury verdict was excessive or based on

improper considerations. The evidence most favorable to the verdict demonstrates that Cecil had medical expenses of more than $46,000, he was hospitalized for more than two weeks, he had two months of physical therapy, he has had and continues to have pain and suffering, and he has been relegated to a wheelchair with his mobility impaired. The jury verdict was within the evidence presented.

Affirmed.

ROBB, J., and BARNES, J., concur.